only say that our space forbade it, and that we have said all that we deemed it prudent or proper to say, at the time, upon this whole subject, in the work named at the beginning of our article.

I. F. R.

RECENT AMERICAN DECISIONS.

In the United States Circuit Court for the Southern District of New York.

PHILIP ALLEN ET AL., *vs.* F. SCHUCHARDT ET AL.

S, acting for parties at Amsterdam, put into the hands of a broker in the city of New York a sample bottle of a quantity of madder, to negotiate a sale. The sale was made in Rhode Island, by the broker, in the name of S., the foreign principal not being disclosed, under an oral contract to A., upon the inspection of the sample bottle, which he refused to open on account of the instructions of S. The madder was, at the time of the sale, in barrels, in a vessel at the port of New York. After the contract was made, a bill of goods was furnished to the purchasers, with a clause, that "no claims for deficiencies shall be allowed unless made within seven days from receipt of goods." The madder in the casks proving inferior to its apparent qualities in the bottle, an action on the case was brought against S., by the purchasers, for damages.

Held—1. The oral contract made in Rhode Island, where the statute of frauds does not prevail, can be enforced here, although the contract, if made in the same manner in New York, would have been void. The fact that the merchandise was in New York does not affect the question.

2. The action on the case is a proper remedy, and it is not necessary to aver a *scienter*.

3. The sale was by sample, and there was an implied warranty that the merchandise should correspond with the apparent qualities of the sample.

4. The clause in the bill of goods respecting deficiencies, is inoperative, as the contract was previously complete.

5. S. not having disclosed his principals, is personally liable.

Before NELSON, C. J., and SHIPMAN, J.

The sample of a quantity of madder was put into the hands of a broker in the city of New York, by the defendants, to make sale of it for them. A sale was made accordingly to the plaintiffs in the State of Rhode Island, upon an inspection of the sample bottle,

which the broker refused to open on account of instructions from his principals. The sample bottle had been forwarded from Amsterdam to the defendants, previous to the shipment of the bulk, and was the only sample of the goods, as none accompanied them. The madder was in barrels, in the vessel, which had arrived in New York, about the time of the sale. The sale was made in the name of the defendants, their principals not being disclosed.

The opinion of the Court was delivered by

NELSON, C. J.—I. The contract of sale in this case was made in Rhode Island, and, though verbal, is there valid, as no sale note is required, as in our statute of frauds. The madder, the subject of the sale, being in New York, or elsewhere, at the time, does not affect this question.[1]

II. The action on the case for a false warranty, is certainly a somewhat antiquated remedy, the action of assumpsit having taken its place; yet we cannot say that it has been abolished or modified on account of the substitution, by the profession, of the new remedy. There are certain advantages to be gained by the adoption of the one or the other, which are not common to both, and, in a count upon a false warranty, the pleader need not aver the *scienter* any more than in that of assumpsit. 1 Wh. Selwyn, p. 486; 2 East, 446; 2 Chitty Pl., p. 101, N. P. 276–7; 1 ib. 139.[2]

III. The sale of the madder was a sale by sample, where the purchaser had no opportunity to examine the bulk; and where he was prohibited by the vendors from opening the sample bottle for the purpose of examining the article, by which act we are inclined to think they assumed the responsibility of maintaining that the bulk was equal to the quality of the article as it appeared to the eye in the bottle. The sale was not only by sample, but was obviously intended to be such by the vendors, as the sample of the madder preceded the arrival of the bulk from abroad, and no sample accompanied it. The sample thus previously forwarded was put into the hands of the broker to sell the one hundred barrels subsequently shipped. This sample thus forwarded was the only one furnished representing this quantity of madder.

[1] See Note 1, *post.*

[2] See Note 2, *post.*

IV. The sale being a sale by sample, there was an implied warranty[3] that the bulk was equal to the sample in quality, which, upon the evidence in the case, it clearly was not. All agree that, from an inspection of the sample, the madder appeared to be pure and unadulterated. From a careful analysis of the bulk by chemists, there was an adulteration, by sand and other foreign substances, exceeding thirty per cent. This evidence preponderates over the weight of the testimony abroad, taken on commission. There was no analysis of the article abroad.

V. The note at the head of the bill of goods rendered "no claims for deficiencies or imperfections allowed, unless made within seven days from receipt of goods," was not binding upon the purchasers. The contract was complete and binding upon both parties before this bill was delivered.

The case is an unfortunate one, as both parties are innocent, the fraud having been perpetrated abroad before the goods were shipped to the defendants, who were mere consignees. The question is, which of these innocent parties, under the facts disclosed, should suffer the loss? The question turns upon a dry rule of law, and, according to my idea of it, the plaintiffs are entitled to the judgment.[4]

The verdict of $10,000 was taken by consent, subject to adjustment and the opinion of the Court upon a case made. I shall deduct thirty per cent. from the price paid for the madder, as furnishing the amount of damages in the case, and give judgment for plaintiff for that sum.

(1.) The familiar principle in this class of cases is, "that so much of the law as affects the *rights and merits* of the contract, is adopted from the foreign country; so much of the law as affects the *remedy* only, is taken from the local law of the country where the action is brought." Does the Statute of Frauds affect the contract or the remedy? It has been held in England, after an extended and elaborate discussion, that the *fourth* section of the statute affects the remedy, and consequently that an oral agreement within that section, made in France, and valid there, cannot be enforced in England. Leroux *vs.* Brown, 12 C. B. 800; S. C. 14 Eng. L. Eq. 247, (1852.) The court rests its decision upon the special language of that section: "*No action* shall be brought upon any agreement which is not to be performed within a year, &c., unless the agreement upon which such action shall be brought *or* some memorandum or note thereof

[3] See Note 3, *post.*

[4] See Note 4, *post.*

shall be in writing," &c. The construction placed upon this language was, that the words, "no action shall be brought," evidently regarded the *remedy*, and the alternative clause showed that the writing was required only for the purposes of evidence. There were *dicta* to the effect that such a construction would not be given to the seventeenth section, regarding sales of goods. These dicta were followed in 1855, by the Supreme Court of Missouri, in Houghtaling *vs.* Ball, 20 Miss. (5 Bennett), 563. The court expressly decides that an oral contract for the sale of *goods*, made in a state where the Statute of Frauds does not prevail, can be enforced in Missouri, where the statute exists substantially in the language of the English seventeenth section. Browne, in his work on the Statute of Frauds, p. 140, note 5, (ed. 1857,) disapproves of the distinction, citing *dicta* in Carrington *vs.* Roots, 2 M. & W. 248; Reade *vs.* Lamb, 6 W. H. & G. Exch. 130. The Missouri case, however, was not before him, and the principal case is in the same direction. There is no distinction in the present New York Statute of Frauds, between the two classes of subjects, and the decision would embrace all the sections. In Dacosta *vs.* Davis, 4 Zabriskie, 319, the authorities are collected in reference to the question whether the absence of the goods affects the law of the place of contract. In this case a contract was made in New Jersey, for the sale of goods at the time in Pennsylvania. The court arrived at the conclusions reached in the present case.

(2.) The old rule was that all actions upon a warranty, whether express or implied, were actions on the case. As to implied warranties, see Keilwey, 91.

Lord Ellenborough, in the case of Williamson *vs.* Allison, 2 East, 446, (1802,) says, that the form of declaring in assumpsit in cases of warranty, had not then prevailed above forty years, and was adopted in order to add the money counts to the declaration. The right to declare in assumpsit on an express warranty, was first discussed and decided in Douglas, 18, (1778.) The distinction as to the necessity of alleging a *scienter* is that if the action is on a warranty, it is not necessary, but if it be in the nature of an action of deceit, *without any warranty, scienter* must be alleged and proved: Note to Williamson *vs.* Allison, supra; Stone *vs.* Denny, 4 Metcalf, 151; 5 B. & A., 797; Bayard *vs.* Malcolm, 1 Johnson, 453. The right to bring an action on the case, for breach of warranty, is fully recognised in this country, among other cases, in 30 Maine, 170; 3 Vermont, 53; 20 Conn., 271; 4 Blackf. 293. An important advantage may sometimes be secured in joining a count for fraudulent misrepresentation with the count on an express warranty, and a recovery thus may be had in accordance with the evidence. A judgment will, it seems, be a bar to an action of assumpsit on the warranty: 23 Pick. 256.

(3.) In determining whether a sale is by sample or not, a material inquiry is, whether the article is open for inspection. It is a reasonable rule, where it is not present and a sample is exhibited, that the sale should be treated as being by sample.

The correspondence of the sample with the article, is the essence of the contract, and the purchaser may say, if this correspondence does not exist, *non in hæc fœdera veni:* Boorman *vs.* Johnston, 12 Wend. 576; Salisbury *vs.* Steiner, 19 Wend. 159; 1 Smith Lead. Cas. 77; note to Chandelor *vs.* Lopus. This principle is in like manner true of a written contract for articles of a particular name not open to inspection: Wieler *vs.* Schilizzi, 17 C. B. 617.

When the article and sample are both open to the purchaser, the same principle does not necessarily prevail. There must be an agreement to sell by sample, or at least an understanding of the parties that the sale is to be a sale by sample: Waring *vs.* Mason, 18 Wend. 434. The question can only be answered by a view of all the circumstances of each case, and the intention of the parties must be gathered from their acts. It is a question of intention, and must be submitted to the jury. The evidence must be sufficient, from which the jury can find that the sale was intended to be a sale by sample: Beirne *vs.* Dord, 1 Selden, 95; Hargous *vs.* Stone, 1 Selden, 73. An exhibition of a sample in such case, without anything more, is only a representation that it has been taken fairly from the bulk of the commodity: *Ib.*

In case of a technical sale by sample, if the article is not equal to the sample, the contract may be rescinded or the merchandise may be retained and an action for damages be brought: 2 Kent's Com., 481; Story on Contracts, § 540; authorities collected by Jewett, J. 1 Seld., 99.

The question decided in this case, that the merchandise must, under the facts proved, correspond with the *appearance* of the sample, and not simply with its real qualities, is of the first impression. The vendor may be regarded as estopped from denying that the *apparent* and *actual* qualities of the goods were different.

(4.) The defendants were liable, not having disclosed their correspondents, on well settled principles of law. If they *had disclosed* their principals, the question would have been raised, whether, as *foreign* factors, the presumption of law is that the dealing was exclusively with them. This doctrine, which was advanced by Judge Story, (Agency, sec. 268, and note 290, 423,) was combated, 2 Kent Com. 630, 631; 22 Wend. 244; disapproved and discarded in Green *vs.* Kopke, 18 C. B., 548, (1856,) and in Oelricks *vs.* Ford, 23 How. U. S., 49, (1859,) Nelson, J., delivering the opinion of the court. The question is one of intention, to be gathered from surrounding circumstances, such as usage, &c. The fact that the principals were foreigners, might be an element in reaching the conclusion. Jervis, C. J., in Green *vs.* Kopke; Coleridge, J., in Mahony *vs.* Kekulé, 5 Ellis & Black., pp. 125, 130. See Heald *vs.* Kenworthy, 10 Exch. 739. "The question is one of fact and not of law," Parke, B. The doctrine itself was only extended to goods sold by *oral* contract. Bray *vs.* Kettell, 1 Allen (Mass.,) 80, (1861,) per Bigelow, C. J. Where there is a written contract, properly executed by an agent, as if signed "A. B., principal, by C. D., agent," and the language is unambiguous, a foreign factor is no more liable than a domestic factor.

S. C.

T. W. D.

In the Supreme Court of Pennsylvania, 1861.

JEPTHA KILLAM *vs.* GEORGE KILLAM.

1. An estate already descended cannot be divested from the legal heirs, and given to the bastard child of an intestate, by a subsequent statute of legitimation; but the legislature may cure the taint of a bastard's blood for the purpose of future inheritance.
2. By an act of the Legislature, passed in 1853, it was provided that George *W.* K., son, and Emily M., daughter of *George* K., shall have and enjoy all the rights and privileges, benefits and advantages of children born in lawful wedlock, and shall be able to inherit and transact any estate whatsoever, as fully and completely to all intents and purposes, as if they had been born in lawful wedlock." The persons named were children of George K., in point of fact, by the same mother, who, after their birth, but before the passage of the act, had been married to a third person, X. At the date of the act all parties were living. George W. died in 1859, unmarried, and without issue, seised of land which had been conveyed to him by his father. In an ejectment by the father against a grantee of X. and his wife: *Held*, that the effect of the act of 1853, was to remove, for *all* purposes of inheritance, the defect of blood of the children, as though, at the time of their birth, their parents had been lawfully married; that the land passed, under the intestate laws of this State, to his natural parents for their joint lives, notwithstanding that the mother was then still the wife of X., remainder to his natural sister, Emily M., in fee; and therefore that the father was entitled to recover, but only as to an equal moiety of the land.
3. *Held*, also, that the case was not affected by the general law of 1855, which provides that the estate of a bastard, dying unmarried and without issue, shall pass to his mother absolutely.
4. *Held*, further, that the fact that the conveyance of the land in question to George *W.* K., by his father, was expressed to be in consideration of natural love and affection, was not material.

Error to Common Pleas of Wayne county.

The opinion of the Court was delivered by

WOODWARD, J.—The reason why a bastard cannot inherit, by the common law, is because he is the son of nobody. Having no ancestor, his blood possesses no inheritable quality; though in respect of his own children, it has the usual descendible quality of pure blood. But a bastard may be made legitimate and capable of inheriting, says Blackstone, and 4th Inst. 36, by the transcendant power of an act of Parliament, and not otherwise, as

was done in the case of John Gaunt's bastard children by a statute of Richard II. We have on our statute books acts of legitimation without number. Because our constitution is silent on the subject, the legislative power is plenary. I am not aware that it has ever been questioned. An estate that has already descended to the legal heir cannot be divested and given to the bastard by a subsequent act of legitimation; but that the taint of his blood may be cured for the purposes of future inheritance by the healing touch of the legislature, is not to be doubted. It is not so questionable an exercise of power as the restoration of inheritable blood by the reversal of an attainder for treason; for the corruption there proceeds from disloyalty to the State, which is a much more grievous offence than fornication.

The business now in hand, however, is not to vindicate the legislative power to restore bastards, but to interpret an act of legitimation. In 1853 the legislature enacted, "that George W. Killam, son, and Emily Miles, daughter, of George Killam, of Wayne county, shall have and enjoy all the rights and privileges, benefits and advantages of children born in lawful wedlock, and shall be able and capable in law to inherit and transmit any estate whatsoever, as fully and completely, to all intents and purposes, as if they had been born in lawful wedlock."

These are very large enabling words. The very definition of a legitimate person is one born in lawful wedlock, and whatever capacities to inherit or transmit an estate such a person possessed in 1853, or should acquire thereafter, were to belong to George W. Killam, and to be among his "rights, privileges, benefits, and advantages." So much is clear. But lawful wedlock with whom? The mother of George W. and Emily is not mentioned or referred to in the enactment. Whether they were children of the same mother, and who was the mother of either or both, the legislature seems not to have known or inquired. They meant undoubtedly that the children should have the same legal capacities as if their father had been at their birth the lawful husband of their mother, and it is fortunate that the construction of the act is rendered easier by the ascertained fact that they had a common mother.

Elizabeth Tyler was the mother of both. They were both born before 1821. After their birth, but long before the act of 1853, their mother was married to Nathaniel Tyler, and both she and the father, George Killam, survive both children. Emily married, and died in 1860, leaving a husband and three minor children. George W. died intestate in 1859, unmarried, and without issue, seized in fee simple of two hundred and eighty acres of land, the subject of the present controversy. In 1860, Tyler and wife conveyed the land to Jeptha Killam, with a full notice that it was claimed both by the father, George Killam, and by the sister, Emily Miles, then still alive. This ejectment was brought by George Killam, the father of the bastard, against Jeptha, the purchaser, from the mother of the bastards, and upon this state of facts the court so construed the act of 1853, as to give the judgment and the land to the plaintiff.

The necessity of defining the exact effect of the act of 1853, is shown by our general intestate laws, which provide for the succession to the estates of intestate children, whether they be legitimate or illegitimate. If legitimate, the real estate, by the 3d section of the act of 8th April, 1833, relative to intestates, goes to the father and mother of the intestate child during their joint lives and the life of the survivor; and by the 5th section to them in fee simple, "in default of issue, and brothers and sisters of the whole blood and their descendants." If the descendant be an illegitimate, then by the 3d section of the act of 27th April, 1855, his real estate goes to his mother in fee simple.

Was George W. legitimate or illegitimate, when he died in 1859? That depends on the effect of the act of 1853. If legitimate, then his father and mother, both being alive, take a joint estate for life in his lands, and his sister, being of full blood, took the remainder in fee, which at her death descended to her heirs. If, on the other hand, he was illegitimate, then under the act of 1855, his mother took the whole in fee simple.

The learned judge must have thought, as the counsel for the defendant in error argues, that after the act of 1853 the children ceased to be illegitimate only as "*between their father and them-*

selves." Notwithstanding the full and strong terms of that legislation, counsel will not agree that it legitimated the children any further than as concerned the one parent. To concede that it legitimated them as to both parents, would admit the mother to a joint inheritance. The immediate effect of such a qualified construction of the act must be to leave them illegitimate as to the mother, and then the act of 1855 brings her in. The only answer which the counsel make to the act of 1855 is, that George W. Killam was not, at its passage, of the class to which it applied. He had been created, say they, the legitimate son of his father by legislative enactment. He had been taken out of the inferior class of illegitimate, "and clothed with all the civil rights of the superior class of legitimate children."

The argument is manifestly *felo de se.* You kill your first position of a qualified or half legitimation, by your second, which invests the children with *all* the civil rights of legitimacy. The question here is not one of inheritance, but of transmission. George W. might have controlled the direction his estate should take by a will, but he elected to leave it to the transmission of the intestate laws. He must be presumed to have known what they were.

It is a truism, too simple to need more than mere assertion, that for the purposes of the intestate acts he must have been either legitimate or illegitimate. They provide for no mongrels or hybrids. Then let it be said that he was legitimate, that though not born in lawful wedlock, the transcendant power of the legislature has made him equal to a son born in lawful wedlock, that though his mother was not ascertained or mentioned by the legislature, she is fully identified by the parties litigant, and her maternity admitted in the record before us, and, therefore, that in legal judgment she should be recognised as entitled to a joint life estate with the defendant in error in the decedent's lands. What is the objection to this? It may be said it is giving undue effect to the act of 1853—that it is virtually making wedlock betwixt a man and a woman who is married to another man—that if the bastards had had several mothers, it would be marrying Killam to each of them, and that it estab-

lishes inheritable blood betwixt a brother and sister, as well as between a father and his children. Let all these consequences be accepted, and what do they amount to? Notwithstanding Mrs. Tyler's present wedlock, she might have been Killam's lawful wife when these children were born. The legislature were not necessarily guilty of an historical untruth, or even of an anachronism, in enacting that she was. A divorce would have qualified her for the second marriage. How do we know that these children were not born in lawful wedlock, the legislature having said they were? How can we impeach the union between the parents, whatever it was, since the legislature has made it lawful? And why should not the act be construed to make George and Emily brother and sister? It is judicially ascertained that they were children of the same father and mother, and they have been legislatively declared legitimate. They then were in law, as in fact, brother and sister of the full blood. As to the embarrassment which would be upon us if they had happened to have been born of different mothers, sufficient unto the day is the evil thereof. That question is not before us, and it shall not distress us.

The other construction of the act of 1853, that which qualifies the legitimacy granted, is not free from greater difficulties. It is opposed to the terms of the enactment, which is sufficient to set it aside. We have seen that the words used by the legislature were large enough to confer all the civil rights of legitimacy, and as it was a remedial and a humane law, it ought not to be cramped in the construction. But again; the intestate laws cannot be administered on the theory of a partial legitimacy. This is apparent enough from what has been already said. It is to be observed that when they admit the mother to the inheritance of a deceased child, whether a legitimate or illegitimate, they admit her not as the wife of the father, but as mother. It is of no moment, therefore, that Mrs. Tyler is not Killam's wife, since he confesses her to be the mother of his children. In that maternal character she takes under the intestate law. If the act of 1853 was intended for the very special purpose supposed by counsel, of establishing relations between the father and son in respect to the land in ques-

tion, how do they account for Emily being embraced in it, between whom and her father there were no transactions in land?

In view of the difficulties of both constructions, we think it more congenial to the spirit of our intestate laws, and more honorable to the motives of all parties, to impute to the act of 1853, not the narrow and inconsistent purpose contended for, but the more generous intent of eradicating all manner of taint from the blood of both George and Emily, and compelling the world to treat them, for all purposes, as legitimate. The consequence is, that George could transmit and Emily could inherit under the intestate laws as if no defect had ever existed.

We see nothing to change our judgment in the fact that this land was conveyed to George W. by his father for a consideration of natural love and affection. He held it as a purchaser, and at his death the fee simple descended to his sister, subject to a life estate of his father and mother for their joint lives, and the life of the survivor. By her the mother's conveyance to Jeptha Killam took what she held, and no more, and, therefore, the judgment should have been for the plaintiff below, not for the whole, but for a joint undivided moiety of the premises.

The judgment is reversed, and judgment is now entered here in favor of George Killam, the plaintiff below and defendant in error, for an undivided moiety of the land mentioned in the writ.

STRONG, J., dissents.

One of the most difficult questions in constitutional jurisprudence, is as to the extent to which civil rights may be affected by retrospective legislation. The fact that neither in the Constitution of the United States, nor in most of those in the separate States, is there any express provision to guarantee them against such interference, has often been observed upon with surprise. While personal liberty and personal security, and the obligation of contracts are guarded with care, other rights are left to depend to a great degree for their protection, upon what is at best but vague and doubtful language. As the right of private property is one of the chief bases of civil society, it might naturally have been expected that some clear and emphatic prohibition against legislation which should impair its integrity, would have found a prominent place in the organic laws of a congeries of republics. Even in the Code Napoleon, in which no great jealousy of the sovereign authority is to be expected, it is declared at the very outset: "*La loi ne dispose que pour l'avenir; elle n'a point d'effet retroactif.*"

(Cod. Civ. Tit. Prel., Art. I., Sect. 2.) And, while in the Roman law no limit could be admitted in practice, to the arbitrary power of the Prince, still, in theory, it was always received as a fundamental maxim, *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari.*

Whether the absence of any general prohibition against the disturbance of private rights in our constitutions, is to be attributed to the same cause which made the Roman laws silent on the subject of parricide, because it was not deemed wise to admit the possibility of such a crime, or to an inherent difficulty in determining the just limits of retroactive legislation, it is not easy to say. It is certain that among the restrictions fixed by the constitution of the United States upon the powers of the States, there is none which prevents the passage of retrospective laws, however unjust or impolitic, except only where they would affect some existing contract, or attach to some previous act penal consequences, which it did possess when committed, for this is the only sense in which the expression "*ex post facto law*" is to be received. Calder *vs.* Bull, 3 Dallas, 388; Satterlee *vs.* Matthewson, 2 Peters, 413; Wilkinson *vs.* Leland, Id. 661; Watson *vs.* Mercer, 8 Peters, 110; Charles River Bridge *vs.* Warren Bridge, 11 Peters, 539; Carpenter *vs.* Comm., 17 How. U. S. 463; Bennett *vs.* Boggs, Baldwin C. C. 174. The self imposed limitations of the State constitutions are of course more extensive than this, but still, as a general proposition, the mere fact that a law is made to operate on past transactions, is not, by itself, sufficient to render it unconstitutional. Calder *vs.* Bull, 2 Root, 350; Comm. *vs.* Lewis, 6 Binn. 271; Schenley *vs.* Comm., 36 Penn. St. 57; String *vs.* State, 1 Blackf. 196; Fisher *vs.* Cockcrill, 5 Monr. 133; Davis *vs.* Ballard, 1 J. J. Marsh, 578; Locke *vs.* Dane, 9 Mass. 360; Oriental Bank *vs.* Freese, 18 Maine, 112; Wilson *vs.* Hardesty, 1 Maryl. Ch. 66; Goshen *vs.* Stonington, 4 Conn. 218; Lockett *vs.* Usry, 28 Geo. 349. Even if it could be considered to this extent, as a violation of the principles of natural justice, a court could have no power, on that ground alone, to declare it void: Comm. *vs.* McClosky, 2 Rawle, 514; Lord *vs.* Chadbourne, 42 Maine, 441. But retrospective legislation, so far from being a necessary infraction of those principles, may often operate in furtherance of equity, good morals, and social order, and where it does so, will generally be sustained, if obnoxious to no express constitutional restriction: Trustees of Cayuga Falls, &c., Academy *vs.* M'Caughy, 2 Ohio St., N. S. 152; Goshen *vs.* Stonington, 4 Conn. 218; Savings Bank *vs.* Allen, 28 Conn. 102. Indeed, in those States where such legislation has been prohibited in terms, the constitutional provision has received a judicial construction which deprives it of almost any special value, by admitting in practice, substantially the same exceptions, as are elsewhere allowed as qualifications of a mere principle of political justice: Merrill *vs.* Sherburne, 1 New Hamp. 199; Woart *vs.* Winnee, 3 Id. 474; Clark *vs.* Clark, 10 N. H. 386; Gilman *vs.* Cutts, 23 Id. (3 Foster) 382; Willard *vs.* Harvey, 24 Id. (4 Fost.) 344; Rich *vs.* Flanders, 39 N. H. 313; Hoge *vs.* Johnson, 2 Yerg. 125; Vansant *vs.* Waddell, Id. 260; Brandon *vs.* Green, 7 Hump. 130; Society *vs.* Wheeler, 2 Gallison, 139; De Cordova *vs.* City of Galveston, 4 Texas, 477.

In determining, then, the validity of a legislative act, something more is usually to be looked at, than its effect on past transactions. In fact, the test will be found to be, in general, not whether the particular statute is or is not retro-

spective in its language; but whether it affects injuriously pre-existent rights of property. It must be observed, that the word "injuriously" is used here in its proper sense, as involving the idea of hurt or damage, not sanctioned or excused by any established rule of law or morals. For there are many ways in which rights of property may be abridged by legislative action, which, as possessing such sanction or excuse, is free from constitutional objection. Thus, in the exercise of what is commonly called the right of eminent domain, (for want of a better name,) the State, through its legislature, may impair, qualify, or destroy private property for a public benefit or to prevent a public injury. This right of eminent domain, which, like the right of self-preservation in individuals, is inherent in the very essence and constitution of civil society, precedes and sustains all private rights, towards which it may be said to stand in the relation of the keystone to the arch. Under this head may be classed laws which authorize the construction of public improvements, police laws which regulate the use of private property, so as to prevent detriment to the public morals or safety, tax laws, which control the application of private property to the support of the government, military laws, which sanction its appropriation to the general defence and security. With respect to these laws, and others of a like character, it is usually provided that compensation shall be made to the individual specially affected, but they are really justified as being the exercise of a paramount and pre-existent right, and therefore causing only *damnum absque injuria*. The same may be predicated of a great variety of legislative acts, which for purposes of general utility modify the incidents of private property; this, indeed, it is scarcely possible for any public statute to avoid doing, in an indirect manner at least. Thus, a law which restricts the testamentary power, if future in its operation, is nevertheless perfectly constitutional, and yet it deprives every citizen, to that extent, of a right which he previously possessed as the owner of property.

These phrases, public use, general utility, and the like, must be considered as indefinite (and so far objectionable) forms of expression for the legitimate and declared objects of civil government, as established in the particular State. Any interference with private rights, except for the necessary attainment of these objects, is therefore, in so far injurious in the proper sense of the word, as being founded upon no paramount right. It may, of course, be also injurious, though professedly directed to that end, by reason of some express restriction in the constitution of the State upon an otherwise paramount right. Now, the power of the judiciary to declare a law void which interferes injuriously with private rights, on one or other of these grounds, may be considered as universally admitted under our system of written constitutions, with its division of political functions. But, if the decisions on this subject are examined with care, it will be found that judges have differed to a very embarrassing extent, as to the exact ground on which their authority is to be rested. This has probably arisen from the influence of two conflicting theories of political government which prevail in this country. One of these, carried to its fullest extent, claims for the State, acting through its different departments, absolute and despotic power, except so far as this is expressly limited by the written constitution. The other, carried to its fullest extent, declares the State to be no more than a political corporation, established

like any other corporation, for definite ends, however exalted in their character, and beyond these, having no just power on the rights of individual citizens. Between these two extremes there are, of course, a variety of shades of opinion. Those who hold by the despotic theory, generally look only to the express restrictions on the legislative authority. The others regard as well the general scope of the constitution, and the supposed purposes for which it has been established.

It has been already observed, that in most of the State constitutions there is no clause which in precise terms covers this subject. The admitted restriction on the legislative power over private rights, is sometimes inferred simply from two well-known provisions, which are usually placed in the bill of rights, as controlling not merely the legislature, but every function of government. *First:* That no man shall be deprived of his property, "except by the law of the land, or by the judgment of his peers," which means the same as the other form in which it is sometimes expressed, "by due process of law:" Case of John and Cherry St., 19 Wend. 676; Brown *vs.* Hummell, 6 Barr, 36; Dale *vs.* Metcalf, 9 Barr, 110. *Second:* That private property shall not be taken for a *public* use without compensation, from which it is inferred that it cannot be taken in any case for a *private* use. See case of Albany street, 11 Wend. 151; Sadler *vs.* White, 34 Alab. 311; Clarke *vs.* White, 2 Swan, 549. An inference of the opposite character, that private property might lawfully be taken for a *private* use without compensation, was once drawn by Chief Justice Gibson from this very clause, see Harvey *vs.* Thomas, 10 Watts, 66, and as a mere matter of verbal logic, his conclusion was as just as the other. But it was unnecessary for the decision of the case before him, and has been expressly reprobated in other cases. Sharpless *vs.* The Mayor, 21 Penn. St. 167; Hays *vs.* Risher, 32 Penn. St. 177; Sadler *vs.* White, 34 Alab. 311.

It cannot be denied, however, that desirable as it may be to extract from these two clauses a sufficient prohibition against legislative interference with private rights, the task is one which involves a considerable latitude of interpretation. The first clause is simply copied in terms or substance from Magna Charta, where it originally stood as a limitation on the executive power, and it has never been supposed in England to apply practically, or otherwise than as the solemn enunciation of a principle of abstract justice, to the legislature. Or, if the question be confined to the mere construction of language, without regard to its historical derivation, we make no perceptible advance. Every statute *is* "the law of the land," unless restrained by some constitutional provision; and to convert a declaration that no man's property shall be taken *except* by the law of the land, into such a restriction, is a mere *petitio principii*, unless we are justified by *some other* constitutional principle, abstract or special, in giving to general words a limited and peculiar signification. It is plain, therefore, that this clause standing by itself, amounts really to nothing. Nor are we helped much more by the other clause which prohibits the taking of private property for *public* use without *due compensation.* From these naked words, three distinct and conflicting inferences may be drawn with equal logical propriety: (1.) That private property *can* be taken for a *private* use: (2.) That it *can* be taken for such use, only on compensation made: and (3.) That it *cannot* be taken for such use in any case. The first of these, which goes on the common

rule of construction, *inclusio unius exclusio alterius*, met, as has been noticed, the approbation of so sound a reasoner as Judge Gibson. The second, which operates by way of analogy, was adopted in Brewer *vs.* Bowman, 9 Geo. 37. The third, which applies the maxim *omne majus continet in se minus*, is the most common construction. It is sufficient to say, in respect to the last, that it also involves a *petitio principii*, unless we have first established that public and private uses stand to each other in the relation of *majus* to *minus*, for this particular purpose, since in themselves they are merely correlative and co-ordinate terms, mutually exclusive, and not in any obvious sense subordinated the one to the other. In other words, as it is contrary to the rules of logic to reason directly from particular to particular, we are thrown back on considerations of a more general character, which must be deduced otherwise than from the language employed. It is the ordinary case of statutory silence, which does not act as its own interpreter. And finally, as the clause is usually relegated to the bill of rights, it creates a restriction not only on the legislative power, but on the judiciary and the executive. The negative inference to be drawn from it, therefore, has no single effect, but must be applied distributively to the subjects of its positive prohibition. The result of this is, that it is, *a priori*, impossible to determine (even assuming that a negative inference is here admissible) which of the functions of government it really affects. To put this in a more tangible shape, if the clause provided that neither A, B, nor C, should take private property for public uses, what positive inference could be drawn from this that B could not take it for other uses?

But while a fair analysis of these special constitutional provisions seriously affects the validity of the conclusions often drawn from them, the argument based on the general scope and purpose of our written constitutions, as usually framed, possesses, it is submitted, much greater strength than is sometimes attributed to it. It is not necessary for its application that we should adopt either of the extreme theories as to the nature and extent of the powers vested in the State, which have been noticed above. Whether these powers, taken in the aggregate, are absolute or limited, their functions have been vested in three distinct branches of government. By this division of powers the function of the legislature is as much restricted to its appointed sphere as that of the judiciary, or of the executive. The fallacy lies in attributing to the first, in the absence of any express constitutional prohibition, the same absolute and unconditioned power, which is supposed by some to be vested in the State itself, as an abstract body. This has naturally arisen from our familiarity with the theory of the English Parliament, which does rightfully exercise that power to its fullest extent. But here a determination of what constitutes the true sphere of legislative action, must precede the discussion of the validity of any particular statute. That this is a task of very great difficulty there can be no doubt; but it is an imperative one, unless we are content to allow the legislature to convert itself into a practical tyranny.

For the present purpose, it is sufficient to assume, as beyond dispute, that the constitutional function of the legislature cannot coincide, to any material extent, with that of the judiciary; and, therefore, that to establish the possession of a particular power by the one is to deny it to the other. Now, one of the primary duties of the judiciary is to determine, upon

any given state of facts, what rule of law is to govern the rights of individual citizens. That this is generally done in the course of litigious proceedings, is an accident dependent on the mode in which the function is exercised. The rule itself, once ascertained, binds not merely the parties to the suit, but the community at large. But at any one time, and with reference to the same state of facts, there can be only one rule of law applicable; what that is may be more or less difficult of discovery, may sometimes be mistaken, but in its essence it is a pre-existent absolute fact, which can be no more made otherwise than it is, by human agency, than any other fact belonging to the past. The function of the judiciary is therefore the declaration of pre-existent law, and it is, *ex necessitate*, an exclusive one, for if any other body could exercise the same function, then there might be, as to the same state of facts, two conflicting rules of law, either co-existent, which is absurd, or that declared by the judiciary being abrogated by the other, which would make the judicial power a subordinate branch of government, which it is not.

Again, legislative power, in the proper sense of the word, consists in the authority to establish general rules of civil conduct, and this can of necessity apply only to future transactions. For the rights arising out of any past state of facts, must have become fixed by reference to some then existing rule of law. Now, those rights can only be destroyed in one of two ways: either by abolishing the existence of the rule, of which they are the consequence, *as a historical fact*, which is impossible; or by preventing their exercise by superior force, which would not be an act of legislation, but of arbitrary power. In other words, a statute which professes in terms to take away a pre-existent right, does not prescribe a rule of civil conduct as such, nor establish any principle to govern the action of the individual; for the action or conduct by which he acquired the right, being a part of the past, is now irrevocable. Such a statute is not really a law, but only an expression of the will of a majority in the legislature, under the pretended form of law. If that majority be not in fact restricted to the mere function of legislation, but possesses arbitrary power, as is to a great degree the case with the British Parliament, and was in every sense so with the French revolutionary convention, such an expression of will, whether calling itself a law, or a decree or an edict, would be valid and efficacious, however objectionable on moral grounds. But with us, to affirm the possession of arbitrary power by the legislature beyond the limits of its special function, is impossible. If it were so, the judiciary and the executive would cease to be coordinate branches of government. Even if we can attribute such power to the State in its original and organic character, nevertheless it has chosen by the constitution to delegate it to and divide it between several departments, and it would be as much a contradiction in terms to speak of three arbitrary powers co-existing in the same State, as of three infinite quantities occupying the same space. One must, *ex vi termini*, exclude or subordinate the rest.

To sum the argument up — Every statute which interferes with a vested right, must do so either by the enunciation of a rule of law to be applied to a pre-existent state of facts, which would be an encroachment on the judicial power; or by the arbitrary destruction of the right itself, which could never be a legislative act. In the one case, it would be the excessive exercise of an existing power; in the other, it would

be the assumption of a power which did not exist. In either case, the judiciary, in the exercise of its constitutional functions, would be bound to declare what was the proper rule of law, and to enforce practically the rights which proceed therefrom, without regard to such an unconstitutional expression of the legislative will.

This mode of considering the general question, besides what seems to be its greater logical accuracy, possesses several advantages over that which claims to deal only with the construction of the two special clauses above referred to. In the first place, it deprives those clauses of the isolated and negative character which they would otherwise possess. It enables us to define "the law of the land," to be that rule of law which the judicial power shall declare to be applicable to any given state of facts. It further explains the reason for an express prohibition against taking private property for a public use without compensation. For every private right, as has been already said, is, from the very constitution of society, subject to the paramount and pre-existent right of the State to modify or even destroy it, when the public necessities, the attainment of the primary ends of government, shall require it. The exercise of this paramount right by the legislature would not be an encroachment on the judiciary, inasmuch as it would not be the application of a new rule of law to a previous state of facts, but only a declaration of the manner in which a pre-existent rule is applied to a new state of facts. As then, a law taking property for a public use would not be objectionable on any general constitutional ground, it was proper to qualify the right by a declaration, which abstract justice required, that the individual should in all cases be compensated for his sacrifice for the general good.

Again, the construction contended for will justify more clearly an universally admitted exception to the unconstitutionality of retrospective laws, in favor of statutes which merely operate on "the remedy," as it is called. The procedure established by law to enforce a right, is no part of the right itself, which often exists without any practical remedy, and most often without any need to call on the State for active assistance. This procedure is essentially of a transitory and prospective character; it is only the performance of the duty of the State to give an efficient protection to civil rights. So long as that duty is substantially performed, the individual has no cause to complain, and the mode of its performance, as a matter belonging to the future, may be varied from time to time, at least before it has incorporated itself with a right in proceedings actually instituted.

Finally, a number of exceptional and at first sight, anomalous cases, some of which will be presently mentioned, can by this means be co-ordinated and brought under the dominion of intelligible principles. Admitting that the main test of the constitutionality of a retrospective law, is, whether it avoids interference with the judicial power, it is plain that laws which merely confirm antecedent rights, remove obstacles to their just exercise, supply defects in the procedure by which they are to be established, and in general terms substitute an adequate for an inadequate remedy for their enforcement, cannot be obnoxious to objection on this ground. It is more difficult to determine to what classes of antecedent rights those principles can properly be applied. It certainly may, to those which would have a clear legal existence but for the positive interference of some rule of public policy or convenience, or but for the mistake or accidental non-observance of

such a rule. It may also apply to some cases of rights resting in moral obligation alone, such as those arising out of domestic relations existing *de facto*, though not lawfully established, an example of which may be found in the preceding decision. But there is a large and undefined class of cases, which deal with rights which are purely *in foro conscientiæ*, where it must be admitted that it is often very hard to discover any satisfactory grounds of decision. To take one man's property and give it to another, merely because we think he deserves it, may suit the character of a beneficent khalif, but not that of a civilized legislature; and yet there are reported cases which almost seem to go to that length. It would be impossible, however, from want of space here, to enter more fully on this subject. It is sufficient to indicate lines of distinction, which may be readily followed out by the student for himself.

Having thus stated in a general manner the principles upon which the constitutional question has been discussed, with more or less of clearness and consistency, we shall briefly consider some of the instances in which they have been practically applied by the decisions, among which there is fortunately much greater uniformity of result than of theory.

It may be taken to be settled, on whatever ground, that vested rights of property cannot be arbitrarily destroyed or affected by the legislature. Dash *vs.* Van Kleeck, 7 Johns. 505; Officer *vs.* Young, 5 Yerg. 322; Hoke *vs.* Henderson, 4 Dev. 15; Allen *vs.* Peden, 2 Car. L. Rep. 63; Dunn *vs.* City Council, Harper's Law, 199; Woodruff *vs.* State, 3 Pike, 302; Oriental Bank *vs.* Freese, 18 Maine, 112; Austin *vs.* Stevens, 24 Maine, 529; Wright *vs.* Marsh, 2 Greene, Iowa, 118; Houston *vs.* Bogle, 10 Ired. 504; Holden *vs.* James, 11 Mass. 403; Lamberton *vs.* Hogan, 2 Barr, 24. And as this cannot be done directly, neither can it be done indirectly, as by the express repeal of a statute under which those rights are held. Benson *vs.* Mayor, &c., 10 Barb. 223. Or through a legislative construction of the statute by a subsequent declaratory law. Hunt *vs.* Hunt, 37 Maine, 334; Houston *vs.* Bogle, 10 Ired. 504; McLeod *vs.* Borroughs, 9 Georgia, 216; Wilder *vs.* Lumpkin, 4 Geo. 212; Dash *vs.* Van Kleeck, 7 Johns. 508; Ogden *vs.* Blackledge, 2 Cranch, 272; West Branch Boom Co. *vs.* Dodge, 31 Penn. St. 285; Gordon *vs.* Ingram, 1 Grant's Cas. 152.

The most obvious instance of interference with vested rights would be an act which in terms took away one man's property to give it to another. It is scarcely conceivable that such a statute could be deliberately passed, without some supposed excuse or palliation; but if it were, it would indisputably be disregarded by the judiciary. Jackson *vs.* Ford, 5 Cowen, 350; Wilkinson *vs.* Leland, 2 Peters, 658; Allen *vs.* Peden, 2 Carolina Law Rep. 63; Hoke *vs.* Henderson, 4 Dev. 15; Dunn *vs.* City Council, Harper, 199; Bowman *vs.* Middleton, 1 Bay, 254; Woodruff *vs.* State, 3 Pike, 305; Hoye *vs.* Swan & Lessee, 5 Maryl. 244; White *vs.* White, 5 Barb. 484; Austin *vs.* University of Pennsylvania, 1 Yeates, 260; Van Horne's Lessee *vs.* Dorrance, 2 Dallas, 304, 310; Pittsburg *vs.* Scott, 1 Barr, 314; Lamberton *vs.* Hogan, 2 Barr, 24; Brown *vs.* Hummell, 6 Barr, 86. But the same effect is often produced by legislative acts which have an apparent justification in the reasons on which they are founded, and in the ends which they propose to attain. Now, if we eliminate those cases in which the property is taken for a public use, or by way of punishment for some alleged

offence, which are governed by distinct constitutional provision, we have left those in which it is taken simply for a private use. This last class of cases, with which alone we have to deal, may again be divided into those where the right of property affected is absolute and complete, and those where it is imperfect, or qualified by some antecedent duty or obligation enforced by the statute, or where, though perfect in itself, it happens to be vested in some one not legally capable of exercising the usual and necessary functions of ownership.

Taking this division as sufficiently accurate for the present purpose, it may safely be said, in the first place, that an act which deprived one man of an absolute and complete right for the benefit of another, has rarely been sustained, however consonant it might seem to be under the circumstances with abstract justice. Thus, a statute which provides that the executors of a tenant for life shall be entitled to claim against the remainder-men for the value of permanent improvements made by the former, is unconstitutional so far as it applies to improvements made before its passage. Austin *vs.* Stevens, 24 Maine, 529; see Society *vs.* Wheeler, 2 Gallison, 139. So of a law which authorizes towns to make ordinances giving liberty to all their inhabitants to pasture their cows on public highways, the soil of which belongs to private individuals. Woodruff *vs.* Neal, 28 Conn. 165. So in some of the States, laws authorizing the taking of land for private ways, mill dams, and the like, have been held unconstitutional. Taylor *vs.* Porter, 4 Hill, 140; Clack *vs.* White, 2 Swan, 549; Sadler *vs.* Langham, 34 Alab. 311; see Brewer *vs.* Bowman, 9 Georgia, 37; *contra* Hickman's Case, 4 Harr. Del. 581. But in Pennsylvania, lateral railroad laws have always been supported; in the later cases on the ground that, being intended for the development of the mineral and other resources of the State, the taking of the land under such acts was really for a *public* use. Harvey *vs.* Thomas, 10 Watts, 63; Harvey *vs.* Lloyd, 8 Barr, 331; Shoenberger *vs.* Mulholland, 8 Barr, 154; Hays *vs.* Risher, 32 Penn. St. 169. It must be admitted, however, that the line of distinction between public and private uses, if this qualification were generally adopted, would be exceedingly thin.

It is not material, in the application of the general principle, whether the right of property affected was originally created by contract or other act of the party, or through the operation of some general law which at the time regulated the descent or transmission of property. Where the title to land has become vested by the death of an intestate, in his heirs, according to the then existing law, it can no more be divested by any general or special legislation than if they had taken by purchase. Thus, where a will is void by reason of a non-compliance with some statutory provision with respect to the mode of its execution, it cannot be validated after the death of the testator, by a confirmatory act, so as to vest the property in the devisees. Greenough *vs.* Greenough, 1 Jones, 489; McCarty *vs.* Hoffner, 23 Penn. St. 567. So where the act makes that devisable which was not devisable at the testator's death, such, for instance, as rights of entry for condition broken. Doe d. Southard *vs.* Central R. R. of New Jersey, 2 Dutcher, 13; see Mullock *vs.* Souder, 5 Watts & S. 198. So where a particular devise is inoperative, by reason of incapacity in the devisee, as in the case of a gift to an unincorporated institution for charitable purposes, a statute vesting the property in trustees for those purposes is void. Green *vs.* Allen, 5 Humph. 170. The same principle applies to statutes legitimating

bastards, which, though valid during the lifetime of the putative parent, are void if passed after his death, so far as they would affect the succession to his property. Norman *vs.* Heist, 5 Watts & Serg. 171; and it has even been held that it is not material that the act by which such a result is attempted, is one which only professes in general terms to validate past marriages by a legislative construction of a previous statute. Hunt *vs.* Hunt, 37 Maine, 337. The status of legitimacy or illegitimacy is determined by the death of the parent, and cannot be subsequently affected. *Id.* But this last decision is in conflict with the case of Goshen *vs.* Stonington, 4 Conn. 209, which will be subsequently referred to.

To this class may also be referred statutes affecting the rights of property arising directly from the relation of husband and wife. It has therefore been held, in some cases, that the "Married Women" acts of several of the States, cannot be constitutionally applied to the rights of a husband in the real estate or in the personal estate of his wife, whether in possession or action. Norris *vs.* Boyea, 3 Kern. 288; Westervelt *vs.* Gregg, 2 Id. 202; Holmes *vs.* Holmes, 4 Barb. 295; White *vs.* White, 5 Barb. 484; Lefever *vs.* Witmer, 10 Barr, 505; Bachman *vs.* Christman, 23 Penn. St. 162; Burson's Appeal, 22 Id. 166; Stehman *vs.* Huber, 21 Id. 260. In other cases a somewhat different doctrine has been maintained. Thus, it has been held that the legislature may constitutionally divest the contingent right of a husband in the chose in action of his wife. Clarke *vs.* McCreary, 12 Sm. & M. 347. And so it has been held, that though a statute cannot take away the vested rights of dower or courtesy, it can those which are merely inchoate. Strong *vs.* Clem, 12 Ind. 37. These cases cannot, however, be properly said to be conflicting, inasmuch as the character of the marital rights at common law in the different States varies very materially. Thus, where, as in Pennsylvania and elsewhere, the right of a husband over the choses in action of his wife is an immediate one, capable of positive and efficient exercise at any time, and in any substantial manner, and only subject, if not exercised, to the contingency of the survivorship of the wife, (see Hill on Trustees, 3d Am. Ed. 619, note,) or where the title by dower or courtesy is one which actually and as an estate in the land commences in the lifetime of the parties, it would be difficult to maintain the constitutionality of a law which simply abrogated their existence. But where, as in other States, the marital rights become vested only at the death of the husband or wife, a different doctrine might very properly obtain.

It may be observed, before leaving this branch of the subject, that where the natural succession to property fails by default of those who, by reason of blood or affinity, fall under the usual designation of heirs, the right of the State by way of escheat is one partaking of the nature of sovereignty, which cannot be bound by any antecedent undertaking. It therefore seems that where the State, by a general law, makes a specific disposition of property to which it might, under such circumstances, become entitled, that disposition may afterwards be changed in any particular case before the right under the general law has become vested by office found. This seems to follow from the case of Gresham *vs.* Rickenbacker, 28 Georgia, 227, though the decision there is somewhat rested on the language of the statute involved.

Passing now from the cases in which the right affected was previously absolute and complete, we may consider

briefly those in which it was already qualified by some antecedent duty or obligation, which the obnoxious statute is intended to enforce. Of course, it must be assumed that this duty or obligation was one for which originally the law furnished no practical remedy, else the statute would be a mere matter of supererogation.

Under this head may be classed those cases where, by contract or otherwise, and according to the very intention of the parties, a perfect legal right would have been created, but for an accidental disregard or omission of some formal statutory requisite to its juridical establishment. Thus, statutes validating deeds, the acknowledgments of which have been defectively certified by the officer taking them, have been frequently held to be constitutional, even as against married women and their heirs. Barnet *vs.* Barnet, 15 Serg. & R. 73; Tate *vs.* Stoolfoos, 16 Serg. & R. 35; Watson *vs.* Mercer, 8 Peters, 88, aff'd S. C. 1 Watts, 330; see observations in Menges *vs.* Dentler, 33 Penn. St. 499; Chestnut *vs.* Shane's Lessee, 16 Ohio, 599; Dulany *vs.* Tilghman, 6 Gill & Johns. 46. After an express decree or judgment of a court, indeed, it has been held, in some cases, to be different, as the matter has then become *res judicata*. Barnet *vs.* Barnet, 15 Serg. & R. 73; Gaines *vs.* Catron, 1 Hump. 84; Garnett *vs.* Stockton, 7 Hump. 84; but in Watson *vs.* Mercer, *ut supr.*, it was expressly decided that the validating act might be applied to a subsequent ejectment between the same parties; and see Satterlee *vs.* Matthewson, 16 Serg. & R. 169, aff'd 2 Peters, 413, to the same effect. The same rule has been applied to statutes intended to cure a mistake in the deed of a feme covert, as the omission of her name in the granting part. Goshorn *vs.* Purcell, 11 Ohio St. N. S. 644. Or to validate the defective exercise of a power. State *vs.* The City of Newark, 3 Dutch. 196. Or to set up and confirm leases and other contracts void as being against some special rule of public policy. Satterlee *vs.* Matthewson, *ut supr.*; Hess *vs.* Werts, 4 Serg. & R. 356; Savings Bank *vs.* Bate, 8 Conn. 505; Savings Bank *vs.* Allen, 28 Id. 102. The same may be said of statutes confirming irregular executions in favor of a purchaser. Mahler *vs.* Chapman, 6 Conn. 54; Beach *vs.* Walker, Id. 190; see Underwood *vs.* Lilly, 10 Serg. & R. 101; McMasters *vs.* Comm., 3 Watts, 294; Willard *vs.* Harvey, 24 N. H. 310. Though where a sheriff's sale is absolutely void, so that no title whatever passes, there being no contract or other obligation resting on the defendant, a confirmatory act will be invalid. Dale *vs.* Medcalf, 9 Barr, 110; Menges *vs.* Dentler, 33 Penn. St. 495. And, finally, the general principle above stated has been applied to acts confirming marriages *de facto*, really intended to be solemnized by the parties, but which, by mistake or ignorance of some statutory regulation, are void in law. Goshen *vs.* Stonington, 4 Conn. 209. This, it is true, was only a settlement case; and it appears, moreover, to be opposed by Hunt *vs.* Hunt, 37 Maine, 334. But it would seem that the doctrine of Goshen *vs.* Stonington, may be supported on the ground that the forms prescribed by law for the solemnization of marriage must, in general, be considered not as belonging to the *substance* of the contract, but as establishing the legal mode of proving it; and that if the parties really meant marriage, and cohabited together in good faith under that ostensible relation, an act which supplies the defect of form should be treated as affecting only the *evidence* of a right, and not the right itself. This distinguishes the case from that of acts legitimating bastards, where

the parents never actually contemplated marriage.

The last class of cases to which reference need be made on the present occasion, is that where a perfect legal right to property exists in persons who, by reason of some disability, such as that of infancy, coverture, or lunacy, are incapable of exercising the ordinary functions of ownership themselves, or of consenting to their vicarious exercise by others. Statutes which, unless such circumstances authorize the sale or pledge of the property in order to raise money for the necessities of the real owner, or because the property is burthensome or unproductive, have very frequently been passed, and almost as often sustained by the courts, at least where the application of the money produced, as directed by the statute, will not otherwise alter the rights of the party. It is plain that this does not attach any new or different incidents to the right of property; it merely removes a temporary bar to its complete and beneficial enjoyment. The disabilities we have above referred to are, to a great degree as to their substance, and entirely so as to their extent, the creations of positive law; and they are qualifications not of a right, but of the means of its exercise, introduced from motives of general policy, or for the protection of the individual. Their withdrawal or suspension in any particular case, when the reason of their enforcement has ceased, is, therefore, plainly no interference with the judicial power, and it is, moreover, a proper legislative act, for it is a mere modification of previous legislation. This power of supplying the defective capacity of its citizens, indeed, is inherent in the State, and constitutes what, in the Roman law, was called its *auctoritas*. This in the true sense of the word is that which *auget, i. e.*, which increases or supplies, the juridical power or *status* which is wanting in one not *sui juris*. The absolute necessity of the existence of such a function somewhere is apparent, and though it is usually delegated in a qualified manner to the guardian, husband, or committee of the person affected, it is not a natural but a derivative power; and if derived, as it must be, from the State alone, it proves the antecedent existence of the function itself as a branch of the legislative power.

The questions which have arisen under this head of our subject are of much importance, and they have given rise to some conflict of decision. Our limits, however, will prevent our entering upon them here; indeed they deserve of themselves a special study. It is sufficient to say that the general principle, as we have just stated it, will be found to be substantially supported by the following among other authorities: Eslep *vs.* Hutchman, 16 Serg. & R. 435; Norris *vs.* Clymer, 2 Barr, 277; Sergeant *vs.* Kuhn, Id. 393; Kerr *vs.* Kitchen, 17 Penn. St. 438; Martin's App., 23 Id. 437; Cochran *vs.* Van Surlay, 20 Wend. 365; Leggett *vs.* Hunter, 19 New York, 445; Fowle *vs.* Finney, 4 Duer, 104; Blagg *vs.* Miles, 1 Story, 426; Rice *vs.* Parkman, 16 Mass. 326; Davis *vs.* Johannot, 7 Metcalf, 388; Snowhill *vs.* Snowhill, 2 Green Ch. 20; Spotswood *vs.* Pendleton, 4 Call, 514; Dorsey *vs.* Gilbert, 11 Gill & Johns. 87; Nelson *vs.* Lee, 10 B. Monr. 495; Carrol *vs.* Olmsted, 16 Ohio, 251; Doe *vs.* Douglass, 2 Blackf. 10; Daws *vs.* State Bank, 7 Ind. 316. In Wilkinson *vs.* Leland, 2 Peters, 627, a statute confirming the sale of property of infant heirs by an executrix, *in order to pay debts* of the decedent, was held valid. But this was under an act of the Legislature of Rhode Island, which, at the

time, had no regular constitution, and the decision, as the enunciation of a general principle, was dissented from, in Jones' Heirs *vs.* Perry, 10 Yerg. 70, where a similar act was held void, on the ground that the legislation, not being for infant's benefit, but for the payment of debts to be ascertained, it was an exercise of judicial power. Where the persons, whose land is to be sold, are *sui juris*, however, the reason, and, therefore, the right, of legislative interference ceases, unless in cases where their assent is expressly shown: Ervine's Appeal, 16 Penn. St. 256; Schoenberger *vs.* School Directors, 32 Penn. St. 34; Kneass' Ap., 31 Id. 87; Powers *vs.* Berger, 2 Selden, 358. Though after the lapse of a great number of years, and acquiescence in a sale made under such an act, the assent of such persons may be presumed, at least in a controversey between strangers: Fullerton *vs.* McArthur, 1 Grant's Cas. 232. H. W.

In the Massachusetts Supreme Judicial Court, January Term, 1861.

LE BRETON *vs.* PEIRCE, THE OWNERS OF PROPERTY, ETC.

If the owners of property have intrusted it to an agent for a special purpose, and the agent, in violation of his duty, has unlawfully consigned the same to be sold, with directions to remit the proceeds to a private creditor of his own, and such creditor, upon being informed by a letter from the consignee of the consignment of the property and directions in reference to the same, manifests his assent thereto by unequivocal acts, and the property is sold by the consignee, and bills of exchange, payable to the agent's creditor or his order, are purchased with the proceeds, and remitted in a letter addressed to him, in compliance with the directions, and the creditor, after receiving notice of the intended remittance, and after manifesting his assent thereto, and after the remittance is actually made, but before it is received, learns for the first time of the manner in which the agent became possessed of the property, and of his wrongful acts in reference to it, the original owners of the property cannot maintain an action for money had and received against such creditor, to recover the amount collected by him upon the bills of exchange.

This case is reported at length in the October number of the LAW REGISTER, to which we must refer the reader. The Court, MERRICK, J., in giving judgment, put the case mainly upon the two points referred to in the following note, which was intended to have been published in the same number with the case.

One of the questions involved in this case is of great interest with business men; and it seems almost incomprehensible how there should have been so much conflict in the decisions of the courts in this country in regard to it.

It probably may have arisen from not clearly discriminating the precise state of facts upon which the different views found themselves. This will readily be perceived by carefully examining the opinions of the different judges. But we think something of this embarrassment may be got rid of by careful classification.

I. Where the negotiation of the note or bill, as between debtor and creditor, is understood to operate either as conditional payment, or to create an expectation between the parties, that the collection of the principal debt shall be delayed until the time of payment of the collateral security, there can be no question that, upon principle and authority, the creditor must be said to take the paper upon full consideration, and in the due course of business. The conflict in the cases seems to arise upon the question, what is *implied* by accepting a note or bill, on time, for a pre-existing debt then due?

1. This will depend, to some extent, upon commercial usage, and the ordinary course of doing business, and the natural implications, from the mere act of accepting the note or bill, and is, therefore, matter of fact, in part, at least. The implication, as matter of fact, is different, in some respects, whether the new note or bill is for the precise amount of the existing debt, as in Michigan State Bank *vs.* The Estate of Leavenworth, 28 Vert. R. 209; or for a different sum, either more or less, and especially when it is for a less sum. Where the new security is for the precise sum of the debt, and is payable on time, there is, in fact, a very strong implication that the creditor will wait until the maturity of the new security. And in that view the cases all agree that the new security is taken for value, and that all equities in favor of other parties will be excluded. And a similar implication results where the new security is for a larger sum than the existing debt, as in Atkinson *vs.* Brooks, 26 Vert. R. 569.

2. But where the security is of a different character from the original debt, as where the creditor takes a mortgage from the debtor for the payment of the sum due in six months, it is not understood there is any implication of a contract to delay the collection of the debt of other parties: United States *vs.* Hodge, 6 How. U. S. R. 279.

3. And where the new security is not given in lieu, or on account of the existing debt, but as a mere pledge, the title of the new security remaining in the debtor, and not passing to the creditor, thus making the creditor the mere trustee or agent of the debtor for the collection of the new security, to be applied, when collected, upon the existing debt, between them, as was held in the case of Austin *vs.* Curtis, 31 Vt. R. 64; the cases all agree that there is no implied undertaking not to collect the existing debt in the mean time.

The following cases may therefore be regarded free of doubt, both upon principle and authority:

1. If the collateral is given in security at the time the debt is created, and as an inducement for the credit, and is a negotiable instrument, and still current, and is, in fact, negotiated to the creditor, so as to make him a party to the paper, and impose upon him the duty of demand and notice, according to strict commercial usage, the cases all agree, so far as they have comprehended the questions involved, that all equities of third parties are excluded: Chickopee Bank *vs.* Chapin, 8 Met. R. 40; Griswold *vs.* Davis, 31 Vt. R. 390; Palmer *vs.* Richards, 1 Eng. L. & Eq. R. 529. The declaration in Williams *vs.* Little, 11 New H. 66, and many other cases to the

contrary, is certainly not maintainable upon any fair view of the question, in that precise form of it.

2. If the collateral is not so negotiated as to make the creditor a party to the paper, and thus impose upon him the duty of making demand and giving notice, but making the creditor the mere agent of the debtor for the collection of the new bill or note, there is no ground of excluding equities in other parties, unless the creditor negotiates the security thus left in his hand to some third party, for value and while current: Palmer *vs.* Richards, 1 Eng. L. & Eq. R. 529; Atkinson *vs.* Brooks, 26 Vert. R. 569; De La Chaumette *vs.* Bank of England, 9 B. & C. 208; Allen *vs.* King, 4 McLean R. 128.

In such case the debtor, it would seem, may recall his collaterals, as the creditor, being his agent, is under his control. But this is certainly not the ordinary case of collateral security.

3. Where there is either an express contract with the creditor, that he shall, in consideration of the indorsement of the new bill, or note, as collateral, delay the collection of the existing debt until the maturity of the new security; or where such an understanding is reasonably to be presumed, from the facts and circumstances attending the transaction, and the delay is thereby obtained, there is no ground of question, since they stand upon the same footing in point of principle, as if an advance were made upon the credit of the new security: Okie *vs.* Spencer, 2 Wharton, 253; S. C., 2 Am. Lead. Cas. 232, and numerous cases there cited. These cases are so obvious upon principle, to the mind of all lawyers, that it would be a useless labor to attempt to render them more perspicuous. What is self-evident thereby becomes incapable of simplification, since there is nothing more obvious by which it can be illustrated.

II. In coming to the inquiry, what is the precise legal implication, from the mere fact of receiving a negotiable security without surrendering any of the former securities for an existing debt, we encounter more perplexity.

1. This will depend, undoubtedly, to a great extent upon the course of doing business, and the commercial usages of the place. From all we can learn of this commercial usage in England, judging both from the reported cases and the elementary works, we infer that each new security is there credited as so much cash at the time it is received, and is charged to the debtor, in case of dishonor, with the addition of expenses attending the protest: Poirier *vs.* Morris, 20 Eng. L. & Eq. R. 103; Bosanquet *vs.* Dudman, 1 Starkie, 1. In this last case Lord Ellenborough said, "that whenever the acceptances exceed the cash balance the plaintiff holds all the collateral bills for value:" Ex parte Pease, 19 Vesey, 25. In this mode of transacting business, the new notes, or bills, from time to time remitted to the creditor by his debtor, are, upon receipt, passed to his credit, and thus virtually discounted. This, we apprehend, is the usual course of doing business, in this country, where one has an open account with banks or bankers, and not unfrequently with brokers. How far it obtains with merchants it is not very certain, depending upon the nature and the amount of the dealings. But whenever the business is conducted in this form, there would be no difference as to the right of the creditor to hold the collaterals, whether they were taken in payment, or as security, or whether any advances in money were made at the precise time the collaterals were negotiated, since passing them to the credit of

the debtor as so much money, is strictly advancing the money upon them. This, we apprehend, is the true explanation of the reason why we find so little said, in the English cases, or treatises on bills and notes, in regard to these distinctions, which occupy so much space in our own reports. The case of The Bank of the Metropolis *vs.* The New England Bank, 1 How. U. S. R. 234, is precisely of this character, and the creditor was allowed to hold the collaterals free from all equities.

2. But in whatever mode the business is transacted, if we look carefully into the true principles involved, we shall come much to the same result. It has always seemed to us that most of the controversy upon this subject has grown out of the different sense in which the terms used are understood. If the term "collateral" is understood to import that the bills thus held are not taken on account of the existing debt, but only to be held until due, and, if paid, the amount to be applied, and, in the mean time, the creditor assumes no responsibility in regard to them, except as the mere agent of the debtor for collection, there could be no ground of claim that any property passed, or that existing equities in former parties were extinguished. The English cases in bankruptcy show very clearly that, in such cases, the title in the bills does not pass to the assignee, but may be retained by the correspondent: Ex parte Pease, 19 Vesey, 25; De La Chaumette *vs.* The Bank of England, *supra*.

3. But we apprehend this is not the ordinary acceptance of the term *collateral*, or collateral security; for it is no *security* at all. The etymology of collateral security indicates that it is something running along with, and, as it were, parallel to, something else, of a similar character. It is collateral to the original indebtedness. It is, of course, a security, but it need not be in the precise form of the original. A bond may be secured by a collateral indebtedness in the form of a bill or note, and *vice versa*, and the collateral will always include other parties. But as far as the debtor is concerned, they are holden for the payment of the debt, and the creditor equally at liberty to pursue all in all legal modes, unless there is some express or implied restriction upon the title of the collaterals.

In this sense the title passes, by the negotiation of a bill or note, as collateral, the same as if the money were advanced. The only difference is, that this form is dispensed with, and the creditor retains his original security. Ordinarily, the collateral may not bind the same parties as the original security, or not all of them. In such cases the creditor will wish to retain the original, so as to lose none of his security. All that the word collateral imports is, that there is a prior or existing debt, and the collateral depends upon that, stands or falls with it, so far as the creditor is concerned.

4. But if the party takes the indorsement of a bill of lading, or of a bill of exchange, or note, he acquires no different rights as to the parties to these new instruments, whether he takes them in payment, or as collateral to an existing debt. In either case he becomes a party to the transaction or contract to the fullest extent, and, in the case of negotiable instruments, is bound to pursue the law merchant in making demand and giving notice, at the peril of making them his own, in actual exoneration of the party negotiating them.

5. In such cases it can be of little importance whether the original debt is treated as extinguished or not, since, if the debtor negotiate the note or bill, by

his own indorsement, which is the usual course, he is bound by such indorsement, and the double bond is of no essential importance. And if the creditor do not take steps to charge his debtor, as indorser, he makes the collateral his own in payment of his debt, and the result is the same, whether he is bound doubly or singly, since the release extinguishes both or one, as the case may be.

6. The mere giving of a negotiable note or bill for an existing debt, is only conditional payment, in any case, by the general law merchant, unless there is an express agreement that it shall extinguish the original debt. Upon the dishonor of the new note or bill, the creditor may sue the original debt, or the indorser of the new bill or note, at his election, so that the note or bill is but a collateral in any case, unless there is some special contract, or some special usage, as in the New England States, that the acceptance of the new note, or bill, shall, *prima facie*, extinguish the debt. These propositions are familiar, and scarcely require specific authority for their support. The cases are carefully collated, in 2 Am. Lead. Cas. 241–273.

III. Most of the conflict in the American cases, and all the English cases, will be readily reconciled by reference to the foregoing distinctions. And those anomalous cases in the American States, which will not come into these distinctions harmoniously, have been decided without properly apprehending the true principles involved, and must be left in their appropriate solitude until they are either abandoned, or else the course of business, or the principles of natural justice become so far modified, that they can be adopted by others.

1. In the case of Poirier *vs.* Morris, *supra*, Crompton, J., said: "Whether the bill was a collateral security, or whether it had the effect of suspending the payment of the antecedent debt, is quite immaterial." And Lord Campbell said: "There is nothing to make a difference between this and the common case, where a bill is taken as security for a debt, and in that case an antecedent debt is a sufficient consideration." And in Percival *vs.* Frampton, 2 C. M. & R. 180, Parke, B., said: "If the note were given to the plaintiffs as security for a previous debt, and they held it as such, they might be properly stated to be holders for valuable consideration." The same rule is recognised in numerous other English cases: Heywood *vs.* Watson, 4 Bing. R. 496; Bosanquet *vs.* Forster, 9 C. & P. 659; Same *vs.* Corser, ib. 664; 2 Am. Lead. Cas. 250, 251. The rule is thus stated in the work last quoted, which has almost become a book of authority in the American courts. "The result of the English cases would seem to be, that accepting a note or bill payable at a future day, on account of a pre-existing debt, will suspend the debt until the note reaches maturity: Byles on Bills, 6 ed. 304." "The law is clear," said Lord Kenyon, in Stedman *vs.* Groch, 1 Esp. R. 4, "that if in payment of a debt the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action for his original debt, until such note or bill becomes payable, and default is made in the payment." And the cases all agree that no recovery can be had in any case, upon the original debt, where the collateral, given in security, was indorsed while current, and is still outstanding: Price *vs.* Price, 16 M. & W. 232, 243. And in every case where the party accepts a collateral as security for a previous debt then due, there is no implied obligation not to negotiate the collateral before maturity. In nine cases out of ten that is done, among business men immediately, for the purpose of raising the

money, which should have been paid when the debt matured; so that the collateral is always received for the ease of the debtor, and it is not ordinarily received as a mere pledge, so that negotiating it would be a breach of good faith. On the contrary, the security, being negotiable, passes as money, and operates as payment conditionally, and is expected to be passed into the market at once.

All that is implied, then, by it being collateral, is, that there is no agreement or implication that the original debt is extinguished. The creditor intends to hold on to his original debt and all other securities. The new security, then, is collateral to the previous debt; but the new security, as between the parties to it, and the creditor, is not affected by it being collateral to the previous debt, any differently from what it would be if it were received in extinguishment of it. It is negotiated in the fullest manner, and subject to the law merchant, and with no restrictions upon its further negotiation. We think, therefore, that the English courts have taken the true view in saying that such paper passes for value, and in the ordinary course of business, and excludes all existing equities, without regard to the understanding, agreement, or implication, as matter of fact, that the creditor should delay the enforcement of the existing debt until the maturity of the new security. And that they are also right in saying, that it makes no difference in principle, or legal effect, whether the existing debt is extinguished or not, or whether the original evidence of debt, or the existing securities, are surrendered or not: Kearslake *vs.* Morgan, 5 Term R. 513; Baker *vs.* Walker, 14 M. & W. 465; Belshaw *vs.* Bush, 11 C. B. 191, 200; Ford *vs.* Beech, 11 Q. B. 852, 873. These transactions, indorsing negotiable securities on account of previous dobts, without special agreeement as to the effect, are there treated as "necessary exceptions to the general rules of law, in favor of the law merchant." This rule has been adopted in this country by the national tribunal of last resort: Swift *vs.* Tyson, 16 Pet. R. 1. This decision was made upon the maturest consideration, and has prevailed in most of the States, and is expressly extended to collaterals: Bank of the Metropolis *vs.* New England Bank, *supra;* Petrie *vs.* Clark, 11 Serg. & R. 377, as early as 1824 adopts almost precisely the same view, except that it is not assumed, as matter of necessary implication, that one who accepts security for a debt will, to some extent, change his conduct in consequence. See also Walker *vs.* Geisse, 4 Wharton, 252. In Holmes *vs.* Smith, 16 Maine, 177, it is decided that where negotiable paper is taken in payment of a previous debt, it will exclude all equities in other parties. To the same extent is Williams *vs.* Little, *supra.* The same view is adopted in Carlisle *vs.* Wishart, 11 Ohio, 172; Norton *vs.* Waite, 20 Maine, 175; Bostwick *vs.* Dodge, 1 Doug. Mich. R. 413; Bush *vs.* Peckard, 3 Harrington R. 385; Brush *vs.* Scribner, 11 Conn. R. 388; Barney *vs.* Earle, 13 Alabama R. 106. In these cases, except Williams *vs.* Little, the question did not arise in regard to negotiable paper being taken as collateral security. But in many of the States, as well as in Swift *vs.* Tyson, and The Bank of the Metropolis *vs.* The New England Bank, *supra,* all such distinction is disclaimed, and held to have no existence in principle. Reddick *vs.* Jones, 6 Iredell, 107; Gibson *vs.* Conner, 3 Kelley, 47; Valette *vs.* Mason, 1 Smith 89, (Indiana); Allaire *vs.* Hartshorn, 1 Zabriskie, 665; Blanchard *vs.* Stevens, 3 Cush. R. 162. The fallacy of supposing that the creditor is in the same condition after having failed to enforce the collection of his col-

laterals, as if he had not received them, is here placed in the clearest light by Dewey, J.: "If the party had not received the note as collateral security, he might have pursued other remedies to enforce the security or payment of his debt. He might have obtained other securities, or, perhaps, payment in money. It is a fallacy to say, that if the plaintiffs are defeated in their attempt to enforce the payment of these notes, they are in as good a situation as they would have been if the notes had not been transferred to them. That fact is assumed not proved, and from the very nature of the case is matter of entire uncertainty. The convenience and safety of those dealing in negotiable paper seem to require and justify the rule that when a person takes a negotiable note not overdue, or apparently dishonored, and without notice, actual or constructive, of want of consideration, or other defence thereto, whether in payment of a precedent debt, or as collateral security for a debt, the holder would have the legal right to enforce the same against the parties thereto, notwithstanding such defence might not have been effectual as between the original parties." And the Supreme Court of Rhode Island, after very careful and thorough examination of the cases, have recently come to the same conclusion: Bank of the Republic *vs.* Carrington, 5 R. I. R. 515; see also Atkinson *vs.* Brooks, 26 Vt. R. 569. It scarcely seems necessary to enumerate the cases in New York and some other States which have followed their lead, where it has been held that paper negotiated as collateral on account of a previous debt, is not taken for value and is subject to all equities. We think it most unquestionable that the New York courts are right in saying there is no distinction, in principle, between taking such paper in payment and as collateral to a pre-existing debt. But the truth undoubtedly is, that either forms a good consideration, and the title of the creditor depends upon the *character* of the paper, and is an exception to all rules attaching to the delivery of *other property* as security for a debt.

The main point of the decision in the very case before us, that the trust, which unquestionably attached to the property which formed the consideration of the bills, could not attach to the bills after they had been bona fide negotiated in the market, although merely between debtor and creditor, and no new advance made specifically on such account, goes exclusively upon the peculiar quality and character of negotiable paper as to the transmission of its title. It passes in the market as money. No man is bound to make any inquiry into the title of the holder. And even carelessness, short of bad faith, will not defeat one's title to such paper, taken for value: Goodman *vs.* Harvey, 4 Ad. & Ellis, 870, overruling Gill *vs.* Cubit, 3 B. & Cr. 466. And whether one advances money and then takes the money in payment of his debt, or takes the note or bill on account of the debt, or as collateral security, is not material, either in fact or in law. And, to be consistent, we must either adopt the New York rule that, in both cases there is no value given for the new note or bill, or else insist that value is given in both cases.

It is impossible, as it seems to us, to successfully contend for the contrary, unless where the previous debt is not due, or the new security is such that no trust is reposed in it, and these are exceptional cases. In every other case, the creditor *will* conduct differently on account of the new security, and *will* delay the collection of the previous debt until the result of the new security is determined. And then it is impossible

to restore the creditor to his former position, since time is a very important matter in commercial transactions. We trust that, before many years, all our American courts will adopt the sensible views of the English courts upon this question, and not expend so much strength hereafter in determining the precise difference between receiving a note or bill "on account of," "in payment of," "as collateral to," and "as security for" an existing debt, since no one, whose perceptions were not rendered very acute by the study of refinements and hair-breadth distinctions, would ever dream that there could be any essential difference in the rights of the creditor to have the full benefits of the new securities, and of "all the collaterals," in the language of Lord Ellenborough in Bosanquet *vs.* Dudman, *supra*, until he obtained full satisfaction of his debt.

I. F. R.

In the Court of Common Pleas of Erie County, Pennsylvania.

WALLACE ET AL. *vs.* WALLACE ET AL.

1. A will which authorizes executors not only to sell at their option, but also to make valuation, division, and allotments of the estate devised, and to make deeds of conveyance therefor, breaks the descent, and vests the estate in the executors, and the heir at law cannot maintain ejectment therefor.
2. Where a plaintiff in ejectment claims, not as heir at law, but as devisee under a will which authorizes the executors not only to sell, but also to make a valuation and allotment of the estate devised, she must show that these provisions of the will have been complied with, so that her portion or purpart may be known and distinguished from that of other devisees mentioned in the will.
3. When an estate is devised to trustees, they to pay over or convey to the *cestui que trust* the one-half part of what they should receive of the estate, and the yearly proceeds of the other half during her natural life, the trustees are the repository of the title for her benefit, and she cannot maintain ejectment for it.
4. If executors or trustees, created by a will, are authorized to make division and allotment of real estate, and neglect or refuse to do it, the remedy for the *cestui que use* is in the Orphans' Court.

This was an action of ejectment for about 4000 acres of land in Erie county, brought by Elizabeth Wallace and J. W. Wall, trustee of Elizabeth Wallace, against John William Wallace and others, No. 149, of May Term, 1860, in the Court of Common Pleas of Erie county, Pennsylvania. The plaintiffs, to sustain their action, offered in evidence a copy of the will of Mrs. Tace Wallace, dec'd, late of Burlington, New Jersey, from the Prerogative Court of said

State. Defendants objected to the evidence because it was not properly certified; the court sustained the objection and rejected the evidence. The defendants, however, waived the informal certificate, and it was again offered, when it was again objected to, for the reasons hereafter mentioned in the opinion of the court; so much of the will, dated July 1821, as is of importance to this case, is as follows, to wit:

"2. *Whereas several of my children, by deed dated the 2d July*, 1819, *did grant and convey to me all their share and interest in the property and estate of their father*, I direct my executors hereinafter named, *as soon as conveniently may be*, to make an estimate of *all* the property which I have, or may be entitled to, *as well under the said deed* as *otherwise*, and then I direct the *whole* to be divided into six equal parts."

Here follow several specific legacies, and then:

"6. One other equal and sixth part I give and devise to my daughter, Elizabeth Wallace, her heirs and assigns: *Provided, that as my said daughter Elizabeth did not join in the said deed of the 2d of July*, 1819, and *will therefore be entitled to receive some portion of her father's estate*, it is my will and intention, that whatever amount she shall receive *therefrom shall be deducted from the said sixth part devised to her*, and the shares so arranged as that they may be all *thus equalized, and all the said girls receive an equal amount from the estate of their said father and my estate together.*"

On the 26th February, 1823, a codicil was added to this will, in which was contained the following: "I direct my estate and the *proceeds* of such part or parts as shall be sold, to be divided into four parts instead of six, and one-fourth to each of my daughters, as in my said will is directed as to one-sixth; *subject to the deductions and provisions therein stated.*" * * * "And I direct that the act of a majority of my executors shall be binding on the rest, and as valid and effectual as if done by all. And I authorize my executors, or a majority of them, *to sell any part of my said estate they may think proper.* And the *valuation, division, and allotment of my said estate, and its proceeds, I direct to be made by my executors, or a majority of them, or by such person or persons as they shall*

call in for that purpose, and the deed of conveyance of the executors, or a majority of them, to make and create a good, sufficient and valid title and estate."

On the 18th day of March, 1826, testatrix added the following codicil to her will:

"I hereby republish all the foregoing as my last will and testament, except as hereinafter excepted, that is to say, I revoke so much thereof as makes my daughters, Rachel and Elizabeth, to be executors, declaring that my sister, Mrs. Susan V. Bradford, my daughter Mary, and my son-in-law, Mark W. Collet, to be my executors; and if either or any of them refuse to act, then the other or others to be so, giving to them and to survivors, and survivors of them, all the power hereinbefore and above stated; the majority having power to act, as before stated. *And in regard to the bequest which I have herein made to my daughter Elizabeth, instead of giving and devising to herself*, as hereinbefore stated, I devise and bequeath what is devised and bequeathed to her, to Dr. Nathan W. Cole and Mark W. Collet, their heirs and assigns, and to the survivors of them, and the heirs and assigns of the survivor, and if either refuse to accept, to the other, his heirs and assigns in trust, that they *pay* over, *or convey* to her the one-half part of what they shall *receive* therefrom, absolutely in fee, and to her own disposal, *and that the other half they retain and pay to her the yearly interest and revenue and profits arising therefrom* (after deducting charges and expenses,) during her natural life, and after her death, that they shall hold the same in trust for such children of my late son, Joshua W. Wallace, Junr., as shall be alive at the time of my decease, share and share alike; and if any of them die before the age of twenty-one years, the share of such to go to the survivors or survivor, *and that the said moiety so held in trust may produce a revenue and interest*, I authorize the said trustees, or whichever may act, and the survivor of them, and the heir and assigns of the survivor, to sell, lease, or otherwise dispose of the same, either for cash or credit, or any part or parts thereof, and the proceeds thereof, to invest in any such way as they may think proper, to be by them held on the same

trusts and with the same power as at first, and so *toties quoties;* but it is to be entirely at the discretion of the trustees or trustee for the time being, whether they or he will sell or not, and how and upon what terms, and how they or he will invest without the direction or control of the *cestui que trust; and the said trustee or trustees are to settle with my executors what* IS *the share or portion thus devised, and their* or *his* acquittance, *exonerate or discharge the executors without the cestui que trust.*"

John P. Vincent and *Wilson Laird*, for plaintiffs.

Hon. Gaylord Church, James C. Marshall, John Wm. Wallace, and *Benjamin Grant*, for defendants.

The opinion of the Court was delivered by

DERRICKSON, J.—The plaintiffs have offered in evidence, as the basis of their right of action, the will of Mrs. Tace Wallace, and the defendants (waiving the incompleteness of its authentication) object to its reception for the purpose for which it is offered, "because it vests no title in the plaintiffs, or either of them, nor gives them such possession or right of possession as will entitle them to maintain their ejectment."

If the right to recover depended alone on the will without the codicils, it would doubtless be complete as to one of the plaintiffs, but unfortunately for him, a codicil was appended, which authorized the executors not only to sell at their option, but also to make valuation, division, and allotments "of the estate devised, and deeds of conveyance therefor." While, therefore, Miss Wallace has an interest in the will of her mother, it is still quite evident she has not such an one as will entitle her to maintain an ejectment for the land covered by it, because it is vested in the executors, though for special purpose. The title could not vest in the executors and the *cestuis que use* at the same time, and the plaintiffs claim by virtue of the will, she cannot claim superior to it. The line of descent was broken by the will, and she claims not as heir at law, but as devisee. To entitle her to succeed, she must show that the terms or provisions of the will have been complied with in the

valuation, division, and allotment of the estate, so that her portion or purpart might be known and distinguished from that of the other devisees mentioned in the will. But this has not been done. This, of itself, would warrant the rejection of the will. But there is another reason therefor. By a subsequent codicil, the testator devises the share previously given to her daughter Elizabeth directly, to trustees, in trust, they pay over or convey to her the one-half part of what *they should receive* of the estate, and the yearly proceeds of the other half during her natural life. This codicil clearly takes away her title to the estate devised, and she can have none in it but through the trustees. They are the repository of the title, though for her benefit, and there it remains until it is properly divested. Has this been done? It is not even alleged that it has been, and we cannot here go into an investigation to ascertain what proportion of the land in controversy, if any, would belong to Miss Wallace. The Orphans' Court is the proper place for this should the executors and trustees decline the execution of their duties. Had action been taken in either way, and the apportionate allotments been made, the plaintiffs, or Miss Wallace alone, might be entitled to recover; but claiming, as she does, exclusively under the will, it would be useless to receive it in evidence, and then have to tell the jury that it vested, *per se*, no such right in her as would entitle her to recover. The introduction of Mr. Wall's name as a co-plaintiff and trustee of the other, gives no additional right to recover, as he is not named in the will, nor is there any evidence of his right to act in either capacity.

For these and other reasons, equally obvious, the objection is sustained, and the evidence rejected.

In the New York Supreme Court, General Term. Fifth District.

BROUNER *vs.* GOLDSMITH ET AL.

When the plaintiff in the course of a trial calls out the declarations of the defendant, it does not follow, that all that was said by defendant can be given in evidence, but only that which tended to qualify that given in evidence by the plaintiff, and no more.

Appeal by the plaintiffs from a judgment entered after a trial at the Circuit with a jury. It appeared in evidence that the plaintiff took a claim of the defendants against Adler & Garson, to collect and have one-third realized, and after the claim had been sued by the plaintiff, the defendants compromised the claim with Adler & Garson, and discharged them without plaintiff's consent. The defendants denied making any such contract with the plaintiff. On the trial the plaintiff tendered a witness to show that the defendants compromised with Adler & Garson, and the defendants called for all that was said upon that occasion, including what was said about the commission, and also what was said about the conditions upon which the plaintiff took the claim for collection. The plaintiff was not present. The Court received the evidence, and the plaintiff excepted, and the defendants had a verdict, and the plaintiff appealed.

G. N. Kennedy, for plaintiff.
N. F. Graves, for defendants.

The opinion of the Court was delivered by

ALLEN, J.—I am of opinion that the Justice erred in admitting evidence of the declarations of defendants at the time they settled the debt against Adler & Garson.

The plaintiff had not called for any declaration of the defendants on that occasion. They had proved a fact, to wit, the compromise and discharge of the debt, and it would probably have been competent for defendants to prove what was said concerning the settlement, and so much of the conversation as made a part of the negotiation as a part of the *res gesta*, and to show what was done; and had the plaintiff called for any part of the conversation, the